IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,183

DCA CASE NO. 91-1248

JUAN NOVATON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, Juan Novaton, was the appellant in the district court of appeal, and the defendant in the trial court. Respondent, The State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. This brief refers to the parties as the "state" and the "defendant." The symbol "A." denotes the appendix to this brief, consisting of the opinion of the district court of appeal.

STATEMENT OF THE CASE AND FACTS

The petitioner, Juan Novaton, entered into a negotiated plea agreement with the state, under which he would plead guilty to the several offenses charged in two separate informations, and would

be sentenced as a violent habitual felony offender to concurrent terms totalling fifty years in prison, subject to a fifteen-year minimum-mandatory requirement. (A. 2). Had he gone to trial and been convicted as charged, the petitioner would have faced the possibility of a life sentence without parole. (A. 2). The trial court accepted the plea after a plea colloquy. (A. 2). The resulting adjudications and sentences included several for the enhanced felonies of burglary, robbery, and aggravated battery with a firearm, and two for the separate crimes of possessing a firearm in the commission of those same felonies. (A. 2).

Mr. Novaton appealed, on the ground that the convictions and sentences for the two counts of possession of a firearm in the commission of a felony were barred by the double jeopardy principles enunciated in Cleveland v. State, 587 So. 2d 1145 (Fla. 1991). (A. 2). The district court of appeal agreed, but held that the plea bargain effected a waiver of the double jeopardy claim. (A. 2). The court recognized that its decision is contrary to decisions of the Fourth and Second District Courts of Appeal. (A. 3). This petition for discretionary review follows.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN ARNOLD v. STATE, 578 So. 2d 515 (Fla. 4th DCA 1991), AND OF THE SECOND DISTRICT COURT OF APPEAL IN KURTZ v. STATE, 564 So. 2d 519 (Fla. 2d DCA 1990).

SUMMARY OF ARGUMENT

The district court's opinion explicitly recognizes that its decision is contrary to decisions of other district courts of appeal on the question of whether cumulative convictions and sentences which are barred under the principles enunciated in Cleveland v. State, 587 So.2d 1145 (Fla. 1991), are waived by the entry of a plea. Accordingly, this Court has jurisdiction to review. That jurisdiction should be exercised and the conflict resolved because of the recurring nature of the problem presented, and its fundamental importance in the administration of criminal justice.

ARGUMENT

THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN ARNOLD v. STATE, 578 So. 2d 515 (Fla. 4th DCA 1991), AND OF THE SECOND DISTRICT COURT OF APPEAL IN KURTZ v. STATE, 564 So. 2d 519 (Fla. 2d DCA 1990).

Under this Court's decision in Cleveland v. State, 587 So. 2d 1145 (Fla. 1991), where an offense has been enhanced because of the use of a firearm, the legislature did not intend that separate punishment also be exacted for the offense of possession of a firearm during the commission of the same felony, and, accordingly, such cumulative punishment is barred by the double jeopardy clause.

In Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991), and Kurtz v. State, 564 So. 2d 519 (Fla. 2d DCA 1990), the Fourth District Court of Appeal and the Second District Court of Appeal, respectively, held that the illegality of a dual conviction and

sentence which is barred by the double jeopardy clause is not waived by the entry of a plea. In this case, while explicitly recognizing the contrary authority of Arnold and Kurtz, the Third District Court of Appeal held that challenges to both cumulative convictions and cumulative sentences are waived by a negotiated plea. (A. 2-3).

With respect to the convictions, the district court's opinion states that in the Third District "a waiver of a Cleveland-type violation with respect to multiple convictions takes place when the defendant voluntarily pleads guilty to the allegedly duplicitous charges in question," and also cites as contrary authority the cases of Arnold and Kurtz.

With respect to the sentences, the district court recognized that "a mere plea does not waive a challenge to dual or multiple sentences which are also precluded by the Cleveland rule" (A. 3), but held "for the first time that a defendant who enters into a negotiated plea and sentence bargain with the prosecution thereby waives an otherwise viable double jeopardy objection to sentences which form part of the agreement." (A. 1).

Because the decision expressly and directly conflicts with decisions of at least two other district courts of appeal, this Court has jurisdiction to review. Art. V, §3(b)(3), Fla. Const. The conflict should be resolved in view of the inevitably recurring nature of the problem presented, namely, whether a plea can waive the illegality of imposing punishment which is constitutionally barred because the legislature did not intend that it be imposed.

CONCLUSION

Based upon the foregoing argument and authorities, petitioner requests this Court to grant review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101 this 10th day of February, 1993.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

JUAN NOVATON, **

Appellant, **

vs. ** CASE NO. 91-1248

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed December 29, 1992.

An Appeal from the Circuit Court for Dade County, William Dimitrouleas, Judge.

Bennett H. Brummer, Public Defender and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Randall Sutton, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and BARKDULL and LEVY, JJ.

SCHWARTZ, Chief Judge.

We hold here for the first time that a defendant who enters into a negotiated plea and sentence bargain with the prosecution thereby waives an otherwise viable double jeopardy objection to sentences which form a part of the agreement.

Novaton was accused in two informations of multiple violent offenses which occurred during separate incidents in 1990. As a part of a broad agreement with the state, in which it agreed, among other things, to forgo the possibility of securing a life-without-parole habitual-violent-offender sentence, Novaton agreed to plead guilty to all of the charges and to concurrent sentences totaling fifty years, subject to a fifteen year minimum-mandatory requirement. The specific sentences to be imposed as to each of the counts were accepted by the defendant as a part of a detailed plea colloquy conducted by the trial judge prior to his acceptance and implementation of the agreement. The resulting adjudications and sentences included several for the enhanced felonies of burglary, robbery, aggravated battery with a firearm and two for the separate crimes of possessing a firearm in the commission of those same felonies. The defendant correctly points out that, as an original matter, the latter two sets of convictions and sentences are barred by the double jeopardy principles enunciated in Cleveland v. State, 587 So. 2d 1145 (Fla. 1991). Benedit v. State, ___ So. 2d____ (Fla. 3d DCA Case no. 92-1329, opinion filed, December 22, 1992), and cases cited. The state counters with the argument that the defendant's bargain effected a waiver of the double jeopardy claim. We agree with that position and therefore affirm both the convictions and sentences on the possession counts.

Challenge To Convictions Waived. There is no question either that (a) as a general proposition, a right to double jeopardy protection against multiple adjudications is susceptible

to a knowing waiver by the defendant, [1] Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); State v. Johnson, 483 So. 2d 420, 423 (Fla. 1986); Guardado v. State, 562 So. 2d 696 (Fla. 3d DCA 1990), review denied, 576 So. 2d 287 (Fla. 1990); Rodriguez v. State, 441 So. 2d. 1129 (Fla. 3d DCA 1983), pet. for review denied, 451 So. 2d 850 (Fla. 1984), and that (b) in this district, a waiver of a Cleveland-type violation with respect to multiple convictions takes place when the defendant voluntarily pleads guilty to the allegedly duplicitous charges in question. Guardado, 562 So. 2d at 696; Anderson v. State, 392 So. 2d 328 (Fla. 3d DCA 1981). Contra Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991); Kurtz v. State, 564 So. 2d 519 (Fla. 2nd DCA 1990). We reiterate that holding here.

Challenge To Sentences Waived. The defendant, however, argues that a mere plea does not waive a challenge to dual or multiple sentences which are also precluded by the Cleveland rule. Guardado, 562 So. 2d at 696; Taylor v. State, 401 So. 2d 877 (Fla. 3d DCA 1981); Hines v. State, 401 So. 2d 878 (Fla. 3d DCA 1981); Anderson, 392 So. 2d at 328; Davis v. State, 392 So. 2d 947 (Fla. 3d DCA 1980). While this observation is correct, the cases cited do not involve[2] and therefore do not apply to the present

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[1] The rule is otherwise as to the separate double jeopardy right to protection against a successive prosecution after a finding of not guilty. See infra note 3. See generally Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); Scalf v. State, 573 So. 2d 202 (Fla. 1st DCA 1991).

[2] These cases either do not indicate there was an agreement to the sentences or affirmatively show that there was none. Thus, in Guardado, the sentences we vacated were imposed upon the revocation of the probation granted when Guardado originally pled to the duplicitous charges in question.

situation, in which the defendant agreed not only to plead to the offenses themselves, but also to the imposition of specified sentences tendered by the state in partial consideration of its own agreement for leniency in other respects. In these circumstances, by the same token that a voluntary plea to the charge waives the double jeopardy guarantee against multiple adjudications of the "same offense," an agreement to the sentences waives the protection from multiple punishments. We have already explicitly so stated:

> Prestridge now claims that double jeopardy safeguards preclude imposition of an increased sentence after the conclusion of the sentencing hearing. This principle does not pertain to Prestridge's sentence because it was the product of a plea agreement with the state. [e.s.]

Prestridge v. State, 519 So. 2d 1147, 1148 (Fla. 3d DCA 1988); see also Ricketts, 483 U.S. at 1, 107 S.Ct. at 2680, 97 L.Ed.2d at 1; United States v. Broce, 488 U.S. 563, 109 S.Ct.757, 102 L.Ed.2d 927(1989); Dermota v. United States, 895 F.2d 1324, 1325 (11th Cir. 1990)("plea agreement in exchange for which the government dismissed eight counts" waives double jeopardy objection to consecutive sentences for crimes which "arose out the same transaction and constitute a single offense"), cert. denied, ___ U.S.___, 111 S.Ct. 107, 112 L.Ed.2d 78 (1990); Rodriguez, 441 So. 2d at 1129 (waiver of protection from increase in sentence upheld).

In many other contexts as well, this court and others have upheld otherwise arguably defective sentences when they have been voluntarily accepted by the defendant as part of a mutually

advantageous agreement with the state.[3] See, e.g., Jacobs v. State, 522 So. 2d 540 (Fla. 3d DCA 1988)(denial of motion to correct allegedly illegal sentences affirmed as part of negotiated plea), review denied, 531 So. 2d 1353 (Fla. 1988); Preston v. State, 411 So. 2d 297, 298-99 (Fla. 3d DCA 1982)(defendant who should have been sentenced as a youthful offender but was placed on probation "waived his right to question the legality of a probation which he has enjoyed and violated"), petition for review denied, 418 So. 2d 1280 (Fla. 1982); Smith v. State, 345 So. 2d 1080, 1082 (Fla. 3d DCA 1977)(sixteen-year-old defendant estopped from challenging probation after violation when she had given a false age and was sentenced as an adult; "[s]he accepted the benefits of probation and had one of the counts against her dropped as part of the plea negotiations"), cert. denied, 353 So. 2d 678 (Fla. 1977); see also Johnson v. State, 458 So. 2d 850, 851 (Fla. 2d DCA 1984)("Because Johnson was bound by her contract, we affirm the sentence."); Bell v. State, 453 So. 2d 478, 480 (Fla. 2d DCA 1984)(plea bargains are encouraged and defendant "bound by

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[3] A waiver cannot be effective, however, when the sentence in question is "void," Rodriguez, 441 So. 2d at 1129, that is, for example, to the extent it exceeds the statutory limit, Ruiz v. State, 537 So. 2d 682 (Fla. 3d DCA 1989), when the court lacks jurisdiction over the case itself, see Solomon v. State, 341 So. 2d 537 (Fla. 2d DCA 1977), or--in the double jeopardy context--when, after an acquittal, the state has lost the power to prosecute a particular charge again. See Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975). Sentences like the present ones, which involve a violation of the rule against multiple convictions or sentences, are not "void" within the meaning of this principle. See Dermota, 895 F.2d at 1326; United States v. Pratt, 657 F.2d 218 (8th Cir. 1981), cited with approval in State v. Johnson, 483 So. 2d at 423; Rodriguez, 441 So. 2d at 1129.

his contract"). See generally Madrigal v. State, 545 So. 2d 392, 394 (Fla. 3d DCA 1989), and cases collected. Having accepted its benefits by avoiding a life sentence without parole, Novaton cannot, any more than any other contracting party, be relieved of the burden of his contract. [4] See Madrigal, 545 So. 2d at 395.

Novaton also claims that a minimum mandatory term may not be required in a habitual offender sentence imposed for a first degree felony punishable by life. This contention is wholly without merit. See Burdick v. State, 594 So. 2d 267 (Fla. 1992); Young v. State, 600 So. 2d 24 (Fla. 3d DCA 1992).

Affirmed.

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[4] We note that, if we ruled otherwise, the defendant might well be faced with the choice of unraveling the entire agreement and facing possible consequences he obviously wishes to avoid. See Prestridge v. State, 519 So. 2d at 1147.